No. 88-1775

(12)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other state supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

II. Is a statement from one attorney to another attorney that did not itself propose a commercial transaction, and that was not directly or primarily used or designed to solicit a commercial transaction, subject to regulation as "commercial" speech simply because the statement could indirectly come to the attention of members of the public who might need legal services?

III. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court to impose a blanket prohibition, rather than a less restrictive form of regulation, on statements that an attorney is a certified specialist, when the statement was not false, misleading or deceptive on its face, and was not shown to have misled anyone?

IV. Does the Equal Protection Clause of the Fourteenth Amendment permit application of a blanket prohibition to petitioner when statements concerning specialization in patent, admiralty or trademark law are exempted from the prohibition, and when attorneys may make the less meaningful and less verifiable statement that they "limit their practice to" or "concentrate their practice in" civil trial advocacy?

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BRIEF FOR PETITIONER

Petitioner Gary E. Peel respectfully prays that this Court reverse the Order and Judgment of the Supreme Court of Illinois entered on February 2, 1989.[1]

OPINIONS BELOW

The February 2, 1989 opinion and judgment of the Supreme Court of Illinois adopting the recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), and imposing public censure on petitioner, is reported at 126 Ill.2d 397, 534 N.E.2d 980 (1989), and is reprinted in the Appendix

[1] The parties to the proceeding below were petitioner and the Illinois Attorney Registration and Disciplinary Commission ("ARDC").

to the petition for certiorari ("App.") at 1a. The one-page Report And Recommendation Of The Review Board of the ARDC, entered February 17, 1988, is unreported and is reprinted at App. 16a. The Report of the Hearing Panel, Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board of the ARDC, entered August 27, 1987, is unreported, and is reprinted at App. 17a.

JURISDICTION

The Order and Judgment of the Supreme Court of Illinois was entered on February 2, 1989. This Court granted certiorari on July 3, 1989. On July 26, 1989, an order was entered enlarging the time for filing petitioner's brief until September 2, 1989. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 2-105(a) of the Illinois Code of Professional Responsibility (107 Ill.2d R. 2-105(a)), provides:

> Rule 2-105. Limitation of Practice
>
> (a) A lawyer shall not hold himself out publicly as a specialist, except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney" or "Trademark Lawyer," or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or "Admiralty Lawyer," or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.
>
> (3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as "certified" or a "specialist." (107 Ill.2d R. 2-105.)

STATEMENT OF THE CASE

This case presents a narrow but important issue of First Amendment law: whether the State of Illinois may constitutionally discipline petitioner Gary E. Peel for including in his letterhead the accurate and readily verifiable statement that he has been certified as a civil trial specialist by the National Board of Trial Advocacy.[2] Petitioner Peel's letterhead was in conflict with Illinois Disciplinary Rule 2-105(a)(3) ("D.R. 2-105"), which

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[2] Petitioner Peel also asserts that Disciplinary Rule 2-105 violates the Equal Protection Clause of the Fourteenth Amendment because, as applied to the statements on his letterhead, the rule is utterly arbitrary and irrational. *See* Point III *infra*.

bans *all* attorney statements about certification. As applied to statements about attorney certification such as the one at issue, however, the blanket prohibition contained in D.R. 2-105 transgresses the First Amendment. Accordingly, the judgment of the Supreme Court of Illinois affirming the public censure of Mr. Peel should be reversed.

As respondent concedes, the relevant facts are simple and undisputed.[3] Petitioner was licensed to practice law in Illinois in 1968, in Arizona in 1979, and in Missouri in 1981. Hearing Transcript ("H.Tr.") at 23; (App. 27a). Petitioner has tried more than a hundred jury cases and more than three hundred nonjury cases to conclusion, and has handled more than a thousand other matters that did not proceed to trial. He has held office in national, state and local bar associations—including vice chair of the Insurance and Tort Committee of the General Practice Section of the American Bar Association—and has taught trial advocacy in continuing legal education classes and workshops. *See* H.Tr. at 23-26 (App. 28a-30a).

In 1981, after satisfying the rigorous standards of the National Board of Trial Advocacy ("NBTA"), petitioner was certified by the NBTA as a specialist in civil trial advocacy. H.Tr. at 26; (App. 29a). In 1983, petitioner began placing on his letterhead the truthful statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy.[4] Petitioner used that

[3] *See* Opposition to Petition for Certiorari, at 1.

[4] An example of Petitioner's letterhead can be found in the Joint Appendix at 24; *see also* App. 21a (typeset reproduction of letterhead). Petitioner's letterhead statement that he is a certified civil trial specialist by NBTA is accurate and nonmisleading. Petitioner is, for example, listed in a directory of "Certified Specialists and Board Members" of NBTA. (J.A. 22). Furthermore, the State has not alleged, and no evidence was offered at petitioner's hearing to prove, that the letterhead statement was false, deceptive or misleading as a factual matter.

letterhead in the "ordinary course" of his practice of law. H.Tr. at 21; (App. 25a). He did not use the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and respondent has never claimed that he did. Specifically, petitioner has never used that statement "in the yellow pages," and has "not mailed out brochures, advertisements or other types of printed materials" containing that statement. H.Tr. at 30; (App. 30a).[5] It was the mere use of a letterhead reflecting NBTA certification—and nothing more—that resulted in Illinois' public censure of petitioner.

1. The Significance of NBTA Certification.

Bona fide attorney certification programs—particularly in trial advocacy—can substantially advance the public interest. Over fifteen years ago, then-Chief Justice Burger commented that "some system of certification for trial advocates is an imperative and long overdue step."[6] In his view, the absence of certification programs "has helped bring about the low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice."[7] He expressly endorsed "certification of the one crucial specialty of trial advocacy

[5] Except for his letterhead, petitioner's certification by the NBTA was publicized in only two other ways. In 1981, when he was first certified (petitioner was recertified in 1986), "[t]here was a newspaper announcement in the business section of the local Edwardsville [Illinois] newspaper which said basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy." H.Tr. at 29; (App. 30a). The fact of certification also appears in petitioner's Martindale-Hubbell listings. H.Tr. at 30; (App. 30a).

[6] Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 *Fordham L. Rev.* 227 (1973).

[7] *Id.* at 230.

that is so basic to a fair system of justice and has had historic recognition in the common law system." [8]

NBTA was founded in 1976 to meet this public need. NBTA seeks to improve the quality of the trial bar and to enhance the delivery of legal services to the public by providing a reliable national credentialing process for specialists in trial advocacy. The organization is sponsored by the National District Attorneys' Association, the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, and the American Board of Professional Liability Attorneys. It is overseen by a distinguished board of judges, practitioners and academics—including Justice William H. Erickson of the Colorado Supreme Court, Chief Judge Donald P. Lay of the United States Court of Appeals for the Eighth Circuit, and Chief Judge Douglas W. Hillman of the United States District Court for the Western District of Michigan.

NBTA certifies only those who meet its exacting objective standards of experience, ability and concentration in trial advocacy. The standards for certification as a civil trial specialist include: (1) current bar membership in good standing; (2) at least five years experience in civil trial law during the period immediately preceding application for certification; (3) substantial concentration in trial practice—defined as at least 30% of the applicant's professional time during each of the five years preceding application; (4) appearance as lead counsel in at least 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of trial and at least five jury trials, and appearance as lead counsel in at least forty additional matters involving the taking of testimony; (5) participation in at least 45 hours of continuing legal education in civil trial advocacy in pro-

[8] *Id.* at 240; *see also id.* at 239, 241.

grams approved by the Board of Directors of NBTA; (6) satisfactory peer review by fellow attorneys and judges; (7) demonstration of high quality written legal work; and (8) successful completion of a rigorous day-long examination designed to test experience, proficiency and knowledge of civil law. Certification must be renewed every five years, and recertification is governed by similarly rigorous standards.[9]

NBTA's certification procedures are widely recognized as exemplary. The Task Force on Lawyer Competence of the Conference of Chief Justices found in a 1982 report that:

> The National Board of Trial Advocacy, a national certification program that provides recognition for superior achievement in trial advocacy, uses a highly-structured certification process in addition to a formal examination to select its members. . . . [C]ertification by the National Board of Trial Advocacy is an arduous process that employs a wide range of assessment methods and entails considerable cost to the candidate.

Report With Findings and Recommendations to The Conference of Chief Justices, May 26, 1982 (Publication Number NCSC-021). The States of Minnesota, Alabama, Georgia and Connecticut have formally endorsed NBTA certification. The Supreme Court of Minnesota has recognized that "NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both." *In re Johnson*, 341 N.W.2d 282, 283 (Minn. 1983); *see also Ex parte Howell*, 487 So.2d 848 (Ala. 1986). Nine other States have adopted their own certification plans, often modelled on NBTA certifica-

[9] *See* Brief *Amicus Curiae* of The National Board of Trial Advocacy In Support of the Petition For Certiorari in No. 88-1775.

tion.[10] In short, as many States acknowledge, NBTA certification provides meaningful information concerning an attorney's civil trial experience and qualifications.

2. The Disciplinary Proceedings Against Petitioner.

On April 15, 1986, while serving as counsel for two *other* attorneys who were the subject of disciplinary proceedings before the ARDC, petitioner corresponded with his attorney/clients on his regular letterhead. Petitioners' clients subsequently attached this correspondence as an exhibit to a submission to the ARDC. The Administrator of the ARDC noticed the statement about NBTA certification on petitioner's letterhead, and initiated a complaint against petitioner on the basis of the letterhead. No lawyer and no member of the public had (or has) ever complained to petitioner or to the ARDC about petitioner's letterhead statement.[11]

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[10] *See* Brief *Amicus Curiae* of the National Board of Trial Advocacy in No. 88-1775, at 2 n.1.

[11] At the hearing before the ARDC, petitioners testified as follows:

"MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressed concern about your listing yourself being certified as the National Board of Trial Advocacy—.

MR. MORAN: Objection. Calls for hearsay.

CHAIRMAN WARREN: We'll let him answer.

THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have, as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

[Continued]

The complaint alleged that petitioner's letterhead statement violated D.R. 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except as provided in that rule, "no lawyer may hold himself out as 'certified' or a 'specialist.'"[12] To make out a violation of D.R. 2-105, the State need not demonstrate that a claim of certification has actually misled, or even created a risk of misleading, potential clients. Even truthful and nonmisleading attorney statements about certification violate the rule. *Cf. Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1920 (1988). The complaint also charged petitioner with violating D.R. 2-101(b), which prohibits any *misleading* statements by an attorney.[13] Petitioner

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[11] [Continued]

MR. MORAN: Same objection.

CHAIRMAN WARREN: Sustained."

H.Tr. at 35; (App. 31a). And in response to interrogatories propounded by petitioner, the ARDC acknowledged that the only persons who "initiated the investigation of the charges which led to the filing of the Complaint" against petitioner were the administrator of the ARDC and his counsel.

[12] The exception clause appears to be completely meaningless, because nothing in Rule 2-105(a) permits any attorney in any circumstance to hold himself out as "certified" or as a "specialist" in any area of law. Although attorneys may hold themselves out as "patent lawyers," or "trademark lawyers," or "admiralty lawyers," and may say they "concentrate" or "limit" their practice to specified areas of law, nowhere does the rule permit any attorney to use the words "certified" or "specialist."

[13] D.R. 2-101(b) prohibits "any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television, or other advertising)" unless that communication contains "all information necessary to make the communication not misleading" and does "not contain any false or misleading statement or otherwise operate to deceive." The ARDC Administrator vigorously pressed this charge at petitioner's hearing, referring to it as the most important of the charges levied against petitioner. H.Tr. at 40-41; (App. 33a-34a). However, the Administrator introduced no evidence that petitioner's letterhead

sought, but did not obtain, dismissal of the complaint on the ground that the First and Fourteenth Amendments barred Illinois from disciplining him for making the accurate and readily verifiable statement that he was certified by NBTA.[14]

At the hearing on the complaint, the Administrator of the ARDC took the position that petitioner's letterhead violated Rule 2-105(a)(3) and was misleading *as a matter of law*.[15] The Administrator did *not* claim the letterhead was misleading as a matter of fact, and no evidence was presented that anyone had, in fact, been misled by the letterhead statement. The Administrator was apparently forced to argue that mention of NBTA certification on petitioner's letterhead was misleading as a matter of

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was, in fact, false, misleading or deceptive, and the Hearing Board rejected the charge. It found petitioner had violated only D.R. 2-105(a)(3).

[14] Indeed, beginning with his first communication with ARDC concerning the charges against him, petitioner consistently, repeatedly, and at every available stage of the proceedings challenged the constitutionality of the disciplinary rules and their application to him. He explicitly relied on the First Amendment, the Equal Protection Clause, prior decisions of this Court, and the decisions of two other state supreme courts, both of which had held that attorneys could not constitutionally be prohibited from truthfully advertising that they had been certified as civil trial specialists by NBTA. *See* Response to ARDC Complaint (App. 22a); Petitioner's Motion to File First Set of Interrogatories; Petitioner's Motion to Dismiss ARDC Complaint. The Illinois Supreme Court considered and squarely rejected those federal constitutional challenges. 534 N.E.2d at 983-986 (App. 12a-14a) (First Amendment); 534 N.E.2d at 986 (App. 14a) (Equal Protection).

[15] The attorney for the Administrator argued, for example, as follows: "I believe it's a question of law whether or not the facts that have been presented here today show that what [petitioner] places on his letterhead is misleading or not." H.Tr. at 37. In interrogatories, petitioner had asked the Administrator to provide the names of any persons who considered his letterhead statement to be misleading. The Administrator responded that petitioner, not the Administrator, would have that information.

law because the Administrator recognized that the Constitution constricts state authority to regulate nonmisleading attorney advertising.[16]

The Administrator did *not* dispute the bona fides of NBTA, or that the fact of NBTA certification was information useful to prospective consumers of legal services. To the contrary, the Administrator was willing to assume that NBTA is a legitimate organization and that certification by NBTA would provide meaningful information to consumers. No other factual assumption was reasonably possible, given the stature and reputation of NBTA. In the view of the Administrator, however, a categorical ban on *all* certification programs was the only way the State could prevent "bogus" certification groups from "popping up" and conferring meaningless certifications.[17] Thus, the Administrator argued that a flat ban on statements about certification and specialization was necessary

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[16] In the Administrator's Memorandum to the Hearing Board opposing petitioner's motion to dismiss the disciplinary charges against him, the Administrator repeatedly expressed his belief, citing decisions of this Court, that the only attorney advertising that can *constitutionally* be regulated or prohibited is advertising that is false, misleading or deceptive.

[17] The Administrator argued to the Hearing Board as follows:

> "In this case, the [state] interest is clearly the [Illinois Supreme] Court's interest in having *bogus* certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The *Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy*, but by having a *complete ban* on saying attorneys are certified or specialists, that is tailoring a substantial state interest that is protecting people from either meaningless or false information by having that ban an *entire ban* that is the best possible remedy to the situation that is before the Court." H.Tr. at 49-50 (emphasis added); (App. 36a).

as a prophylactic rule, even though the record in the present proceedings contained not a shred of evidence suggesting petitioner's letterhead posed a risk of the harms against which the rule is meant to guard.

The Hearing Board, in its "Findings of Facts," made no "particularized finding"—or even a generalized finding—that the statement was "false or misleading." *See Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1920. And the Board rejected the charge that petitioner had violated D.R. 2-101(b), which prohibits all false or misleading publicity by an attorney.[18] Instead, the Board held, in its "Conclusion of Law," that the statement was misleading as a matter of law, and violated D.R. 2-105, because the Supreme Court of Illinois had not approved any form of certification: "We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process." [19] The Board gave no indication of how the absence of state approval might render the statement on petitioner's letterhead misleading, but presumably the Board acted in response to the arguments put before it by the Administrator. Thus, even though certification by the NBTA would provide meaningful information to consumers, the Administrator convinced the Board to impose a "prophylactic ban," because that prophylactic rule would block the emergence of "spurious

[18] *See* note 13 *supra*. The Administrator did not take exceptions to or appeal from rejection of his charge under Rule 2-101(b). Consequently, the only rule at issue before the Review Board and before the Illinois Supreme Court was Rule 2-105(a)(3).

[19] Report of the Hearing Panel Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board, at 5; App. 20a. The Hearing Board's use of quotation marks around the word misleading is consistent with its refusal to find petitioner's letterhead statement misleading as a matter of fact.

certifying organizations whose certifications would be meaningless." [20]

3. The Ruling of the Illinois Supreme Court.

After summary affirmance by the ARDC Review Board (App. 16a), the Supreme Court of Illinois reviewed the Hearing Board's decision. The court affirmed the legal conclusions of the Hearing Board in all respects, and specifically rejected petitioner's constitutional challenges to the application of D.R. 2-105. Petitioner's statement about NBTA certification was held to be "inherently misleading" for two reasons. 534 N.E.2d at 983-985; (App. 9a). First, "the general public could be misled" into thinking that petitioner had been certified *by the State* as a civil trial specialist. Second, the statment "tacitly attests to the qualifications of the respondent as a civil trial advocate." *Id.* (emphasis added)

The court reached these conclusions notwithstanding that petitioner's letterhead unambiguously stated that he was certified by the "*National* Board of Trial Advocacy," and carefully distinguished between *certification* by this

[20] Memorandum of the Administrator in opposition to petitioner's motion to dismiss, at 5:

> "The substantial state interest involved in this situation is the protection of the public from false or misleading information. Lawyer advertising concerning the quality of legal services is inherently misleading. In addition, permitting claims of certification or specialty by attorneys in their advertising, would likely spawn spurious certifying organizations whose certifications would be meaningless. Therefore, a ban on this type of attorney advertising is appropriate.
>
> The prophylactic ban described above is the only means available to the Supreme Court of Illinois to advance its substantial state interest. Claims as to quality of legal services are not susceptible to measurement or verification. Therefore, the only possible means of regulation in this situation is to ban claims of 'certification' or 'specialty.' "

national organization and *licensure* by Illinois, Missouri, and Arizona. (J.A. 24). The opinion did not suggest how potential clients might be misled about petitioner's substantial qualifications as a civil trial advocate. No consideration was given to the possibility that the potential risks identified by the court could be controlled through a number of far less restrictive regulatory means. Nor did the court attempt to justify D.R. 2-105's blanket prohibition by identifying any substantial state interest apart from the risk of misleading potential clients.

This court granted certiorari on July 3, 1989. 109 S. Ct. 3240 (1989).

SUMMARY OF ARGUMENT

The imposition of public censure upon petitioner for his letterhead statement about NBTA certification violated his rights under the First and Fourteenth Amendments.

First, even assuming the State had the authority to regulate the expression at issue as "commercial speech," D.R. 2-105's blanket prohibition of *all* statements about certification transgresses First Amendment limitations on state regulation of commercial speech, as set for in *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989). All statements about certification cannot be banned on the ground that they are "inherently misleading." As the facts of this case demonstrate, statements about certification by bona fide certifying organizations such as NBTA can provide the public with valuable information about the experience and qualifications of trial advocates. Because statements about certification are, at most, *potentially* misleading, state efforts to regulate them must be narrowly tailored to protect a substantial state interest. In the present case, the

State of Illinois cannot demonstrate that the blanket prohibition imposed by D.R. 2-105 meets this test. (Point I).

Second, on the facts of this case the State lacked the authority to regulate petitioner's letterhead as "commercial speech." This Court has defined "commercial speech" as expression that occurs in the context of proposing a commercial transaction. *Fox*, 109 S. Ct. at 3032. Petitioner's statement about certification was not made in the course of a commercial transaction. It did not appear in any advertisement, and was not part of any solicitation effort. It was, therefore, entitled to full First Amendment protection. (Point II)

Third, the ban of *all* statements about certification violates the Equal Protection Clause of the Fourteenth Amendment because it is premised on an arbitrary and irrational classification. D.R. 2-105 explicitly permits attorneys to state that they "concentrate" in legal specialities, and to state that they are patent, trademark or admiralty practitioners, irrespective of their experience and qualifications in these fields. Thus, although an attorney who has recently begun practice can publicize the potentially misleading claim that he or she "concentrates" in civil trial advocacy or is a "trademark" or "patent" lawyer, an attorney with substantial experience and qualifications like petitioner is banned from making the accurate and reliable statement that he is certified as a civil trial specialist by NBTA. (Point III)

ARGUMENT

I. THE APPLICATION OF D.R. 2-105 TO PETITIONER'S LETTERHEAD STATEMENT ABOUT NBTA CERTIFICATION VIOLATES FIRST AMENDMENT LIMITATIONS ON STATE AUTHORITY TO REGULATE COMMERCIAL SPEECH.

For the reasons set forth in Point II, *infra*, petitioner's letterhead is not properly subject to regulation as "commercial speech." The application of D.R. 2-105 to petitioner would, however, violate the First Amendment even if petitioner's letterhead were within that category of expression. The First Amendment requires state efforts to regulate commercial speech to be narrowly tailored to protect substantial state interests. *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989). Respondent cannot demonstrate that the sweeping application of D.R. 2-105 to *all* attorney statements about certification, including petitioner's, meets this First Amendment standard. The present case can therefore be resolved in favor of petitioner without reaching the broader issue of the proper scope of "commercial speech." *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

A. State Regulation Of Commercial Speech By Attorneys Must Be Narrowly Drawn And No Broader Than Reasonably Necessary To Further Substantial Interests.

This Court's recent decision in *Board of Trustees of the State University of New York v. Fox* sets forth the standards for evaluating the constitutionality of D.R. 2-105 as applied to commercial speech. *Fox* makes clear that "restrictions designed to prevent deceptive advertising must be 'narrowly drawn,' and 'no more extensive than reasonably necessary to further substantial interests.'" 109 S. Ct. at 3033 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (internal citations omitted). In particular, the First Amendment requires "the government goal to be substantial, and the cost to be carefully calculated" to minimize the suppression of valuable expression. *Fox*, 109 S. Ct. at 3035.[21] This standard applies fully to commercial speech by attorneys. *See Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. at 205.

Blanket prohibitions of commercial speech are extremely disfavored. The mere opportunity "for isolated abuses or mistakes does not justify a total ban on . . . protected commercial speech." *Shapero*, 108 S. Ct. at 1923. Government may not suppress truthful and nondeceptive advertising "simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. As this Court has repeatedly made clear:

> "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the

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[21] Although this Court held in Fox that a State regulating commercial speech need not demonstrate that it is employing the *least* restrictive means available to achieve its goals, the Court made clear that the State nonetheless must meet a substantial burden. It must "affirmatively establish" that its goal is substantial and that the means of achieving the goal is "carefully calculated" to avoid suppression of valuable speech. 109 S. Ct. at 3035. The Court "insisted" that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Id.* at 3034 (internal quotations omitted). The Court also stressed that the test for evaluating state regulation of commercial speech is "far different" from, and more demanding than, the deferential rational basis test used for Fourteenth Amendment equal protection analysis. *Id.* 3035-3036.

false, the helpful from the misleading, and the harmless from the harmful."

Id. Accord Fox, 109 S. Ct. at 3034; *Shapero*, 108 S. Ct. at 1924.

The First Amendment tolerates blanket prohibitions only in rare instances in which (a) *all* expression targeted by the regulation is inherently misleading, or (b) a complete ban is reasonably necessary to protect some other substantial state interest. *Fox*, 109 S. Ct. at 3032; *Shapero*, 108 S. Ct. at 1921; *Zauderer*, 471 U.S. at 644-645; *In re R.M.J.*, 455 U.S. at 202-203.[22] "Inherently misleading" expression necessarily and irremediably deceives its audience in a material way. This Court has been careful to distinguish between this limited category of unprotected expression and expression that merely contains the *potential* to mislead. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. *See also Shapero*, 108 S. Ct. at 1923. Applying these principles, this Court has consistently rejected blanket prohibitions of attorneys' commercial speech. *E.g., Shapero*, 108 S. Ct. at 1922-1924 (targeted mail solicitation); *Zauderer*, 471 U.S. at 644-649 (legal advice, illustrations); *In re R.M.J.*, 455 U.S. at 204-207 (areas of practice and bar admissions); *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-374 (1977) (price advertising).

[22] *Cf. Frisby v. Schultz*, 108 S. Ct. 2495, 2502-2503 (1988):

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984). *A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.*

108 S. Ct. at 2502-2503 (emphasis added). *Frisby* involved the requirement that time, place and manner restrictions be narrowly tailored to avoid suppression that is not reasonably necessary to achievement of the State's interest. In *Fox*, this Court indicated that the "narrow tailoring" requirement for time, place and manner restrictions is "substantially similar" to the "narrow tailoring" requirement for regulation of commercial speech. 109 S. Ct. at 3033.

The State may use means short of outright bans to regulate *potentially* misleading commercial speech by attorneys, but any such regulation must "be narrowly crafted to serve the State's purpose[]" of preventing deception. *Zauderer*, 471 U.S. at 644; *In re R.M.J.*, 433 U.S. at 205-207. The "State bears the burden of justifying its restrictions." *Fox*, 109 S. Ct. at 3035. It must "affirmatively establish" that the regulation is narrowly tailored to vindicate a substantial interest. *Id.; see also Zauderer*, 471 U.S. at 647-648 (interest in "decorum" insufficient, no evidence of harm, no showing that narrower regulatory options insufficient); In re *R.M.J.*, 455 U.S. at 205 (no evidence of harm, no showing that narrower regulatory options insufficient).

B. Under The Controlling Standards Set Forth By This Court, The Blanket Prohibition of All Attorney Statements About Certification Contained in D.R. 2-105 Violates The First Amendment.

These principles require reversal of the judgment and order below. The State seeks to justify its prohibition of *all* attorney statements about certification—including the one contained in petitioner's letterhead—with the untenable claim that *all* such statements are "inherently misleading." But, as demonstrated in this Point, petitioner's letterhead statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy was entirely accurate, and reflected substantial professional accomplishment. It is an example of precisely the type of "accurate communication by lawyers concerning their services and experiences" that will advance the public interest. 534 N.E.2d at 985 (App. 12a).[23] Moreover, as also demonstrated in this Point,

[23] *Quoting* American Bar Association Standing Committee On Ethics and Professional Responsibility Report to the House of Delegates (Draft Report), August 29, 1988, at 5.

application of D.R. 2-105 to all statements about certification is *not* a narrowly tailored means to advance a substantial state interest in protecting the public from being misled.[24] Because the State has made no effort to "distinguish[] the truthful from the false, the helpful from the misleading, and the harmless from the harmful," *Zauderer*, 471 U.S. at 646, D.R. 2-105 is thus no less unconstitutional than the blanket prohibitions struck down in *Shapero*, *Zauderer*, *In re R.M.J.* and *Bates*.

1. *Petitioner's statement about NBTA certification is not inherently misleading.*

Respondent attempts to pretermit First Amendment scrutiny of D.R. 2-105 by baldly asserting that *all* statements about certification—including petitioner's—are "inherently misleading," and can therefore be banned without any showing that the ban is narrowly tailored to vindicate a substantial state interest. This *ipse dixit* does not satisfy respondent's First Amendment burden.

This Court has repeatedly refused to condone blanket prohibitions of attorneys' commercial speech, notwithstanding state claims that the banned expression was "inherently misleading."[25] In *Bates v. State Bar of Arizona*, this Court rejected the State's assertion that routine price advertising was "inherently misleading." 433 U.S. 350, 372-373 (1977). The Court found that the State's

[24] The State has not even attempted to suggest any additional substantial interest—other than protecting the public from being misled—that might conceivably justify the blanket prohibition of D.R. 2-105. The constitutionality of D.R. 2-105 thus must be tested in terms of whether it is narrowly tailored and reasonably necessary to vindicate a substantial state interest in preventing the public from being misled.

[25] The determination whether a particular type of expression is so "inherently misleading" that it may be completely banned is one of "constitutional fact" that must be made *de novo* by this Court. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 505-509 (1984) (collecting cases).

claim was "refuted by the record," because there—as here—the particular publication at issue presented none of the risks against which the blanket prohibition was meant to guard. *Id.* at 373. In *In re R.M.J.*, this Court rejected prophylactic rules limiting the ways attorneys could describe their fields of practice, and prohibiting advertisements of bar admissions. Because "[s]uch information is not misleading on its face," and no showing had been made that the information had in fact misled anyone, this Court held that the State could not justify its prophylactic ban. 455 U.S. at 205.

In *Zauderer*, this Court rejected the State's assertion that a blanket prohibition of attorney advertising containing legal advice was necessary because it was allegedly impossible to distinguish reliable from unreliable legal advice. This claim, the Court held, was "belied by the facts"; the expression at issue was "easily verifiable and completely accurate." 471 U.S. at 645. And in *Shapero*, this Court rejected the State's claim that a prophylactic ban of direct-mail solicitation by attorneys was necessary to protect against the "inherently misleading" nature of such solicitations. The State's argument was unsupportable because the record contained no "particularized finding" that the *advertisement at issue* was in fact misleading, and the State had shown at most the *potential* for "isolated abuses or mistakes." 108 S. Ct. at 1920, 1923.

The reasoning of these decisions controls here. The State of Illinois posited two ways in which *all* statements about certification—including petitioner's—could be misleading: (i) a statement about certification "tacitly attests" to "qualifications . . . as a civil trial advocate"; and (ii) "the general public *could* be misled" into thinking certification had been done *by the State*. 534 N.E.2d at 983-985 (emphasis added); (App. 9a). These risks are ephemeral. The State's argument that *all* statements about certification are "inherently misleading" is "re-

futed by the record in this case." *See Bates*, 433 U.S. at 373.

a. *Attorney background and qualifications.* Statements about certification do not inherently mislead the public about attorney qualifications. The opinion of the Supreme Court of Illinois in this case contains no support for the contrary conclusion. The court asserted only that petitioner's statement about NBTA certification "tacitly attests" to his experience and qualifications as a civil trial advocate. This assertion does not even remotely justify the conclusion that petitioner's statement about certification is "*inherently* misleading." The public will be misled only if the claim of NBTA certification creates a *false* impression about petitioner's background and experience as a civil trial advocate.

Petitioner's letterhead presents no such risk. The bona fides of the NBTA are not open to doubt. Certification by NBTA is a mark of genuine accomplishment, as several States already officially recognize. *See* pages 6-7 *supra*. NBTA certification—and the experience and competence to which it attests—is "easily verifiable and completely accurate" factual information. *Zauderer*, 471 U.S. at 645. Communication of the fact of NBTA certification to potential clients will enhance their ability to make informed decisions about legal representation. As in *Zauderer*, the State seeks to justify application of a blanket prohibition "notwithstanding that [the] particular advertisement has none of the vices that allegedly justify the rule." 471 U.S. at 644.

At most, attorney claims of certification might be *potentially* misleading in *other* circumstances—not before this Court—where the claim creates a false impression about an attorney's qualifications. That might be the case for claims premised on certification by a disreputable or "bogus" organization. A risk might also be present where the attorney simply claims to be "certified" without disclosing the identity of the certifying organization,

or where an attorney claims to be a "specialist" without disclosing any factual foundation for the claim. No such risk is present when attorneys make accurate statements that they are certified by bona fide credentialing organizations.

Respondent's attempted justification for this complete ban on *all* statements about certification rests on a faulty reading of this Court's dictum in *In re R.M.J.*, that claims as to the quality of legal services "might be so likely to mislead as to warrant restriction." 455 U.S. at 201. Neither *In re R.M.J.* nor any other decision of this Court suggests that all statements bearing on qualifications and experience are inherently misleading. Although this Court's decisions have

> "left open the possibility that States may prevent attorneys from making *nonverifiable* claims regarding the quality of their services, they do not permit a state to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas."

Zauderer, 471 U.S. at 640 n.9 (emphasis added).

The meaning of NBTA certification, and the fact that a practitioner is certified, are readily verifiable.[26] And

[26] The Supreme Court of Illinois made much of the fact that petitioner and *amici* differed in their descriptions of what NBTA certification denoted. This difference, however, does not materially undermine petitioner's claim. As was made clear in the brief *amicus curiae* in support of the petition for certiorari by the National Board of Trial Advocacy, NBTA had recently revised its standards, and the differences between petitioner's description and those of the *amici* simply reflect the fact that petitioner was unaware of the revisions. Moreover, satisfaction of any of the different sets of standards identified by the Illinois Supreme Court would have denoted substantial professional competence and accomplishment.

accurate statements about certification pose no risk of misleading potential clients about the background and qualifications of the certified attorney. To the extent potential clients infer that an NBTA-certified attorney has substantial qualifications in the area of civil trial advocacy, the inference will be wholly warranted; the design of NBTA certification is to identify qualified and experienced trial advocates. Indeed, one important way in which NBTA certification—and certification in the medical and mental health professions—advances the public interest is by providing the general public with objective indicia of special qualifications or experience. Accordingly, even if the State has a legitimate interest in preventing "inherently misleading" *non*verifiable statements about the quality of an attorney's services—an issue not before this Court—that interest cannot justify a ban on accurate and verifiable statements about certification by reputable, bona fide certifying organizations such as NBTA.

b. *State sponsorship.* Respondent also argues that petitioner's letterhead is "inherently misleading" because members of the public "*could* be misled" into believing that NBTA certification carries with it the imprimatur of the State of Illinois. 534 N.E.2d at 984 (emphasis added); (App. 9a). This argument is also "belied by the facts." *Zauderer*, 471 U.S. at 645. Petitioner's letterhead carefully distinguishes between certification by the *National* Board of Trial Advocacy and licensure by the *States* of Illinois, Missouri, and Arizona. The possibility that a reader would misunderstand the statement about certification by a "national" organization as implying certification by the State of Illinois is remote at best. The State offered no evidence that anyone was in fact misled in this way. Indeed, the State's claim that

NBTA certification is "inherently misleading" is substantially undermined by the fact that the Supreme Courts of Alabama and Minnesota found that publicizing NBTA certification did not pose any substantial risk of inevitably misleading consumers in the way posited by the Supreme Court of Illinois. *See Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 341 N.W.2d 282 (Minn. 1983).

In any event, the First Amendment precludes the State from placing "an absolute prohibition" on attorney statements about certification "if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. To ensure that the public does not erroneously assume state certification or endorsement of certifications by private organizations, Illinois might require that claims of certification be accompanied by an appropriate disclaimer.[27] The ease with which the State's interest can be vindicated by this simple requirement of *additional* disclosure makes clear that the expression at issue is not inherently and intractably misleading. *Cf. Bates v. State Bar of Arizona*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less").

At bottom, respondent's argument is that petitioner's letterhead statement about NBTA certification is so intrinsically deceptive and lacking in value that it deserves no First Amendment protection whatsoever. As demonstrated, that argument has no merit.

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[27] Such a disclaimer might be modelled on the current letterhead practice of indicating that an attorney is licensed in more than one State. The statement about certification could be accompanied by an asterisk directing the reader to an appropriate disclaimer on the letterhead.

2. *D.R. 2-105 cannot be justified as narrowly tailored and reasonably necessary to vindicate the State's interest in preventing* potential *deception of the general public.*

Because attorney statements about NBTA certification are not inherently misleading, the comprehensive ban of D.R. 2-105 can survive First Amendment scrutiny only if the State can demonstrate that the ban is narrowly tailored to vindicate a substantial state interest. *Fox*, 109 S. Ct. at 3032-3035. The sole potential harm identified by the State in this case is the risk that the general public could be misled by statements about certification. But Respondent has not even argued that the blanket prohibition of D.R. 2-105 is a narrowly tailored means that is reasonably necessary to protect consumers from this harm.

Illinois has instead opted for, and seeks to justify, the *most* restrictive means of regulating attorney claims respecting certification. Even though it found no more than "opportunities for isolated abuses or mistakes," Illinois has imposed "a total ban on that mode of protected commercial speech." *Shapero*, 108 S. Ct. at 1923. The State has made *no* effort to "distinguish[] the truthful from the false, the helpful from the misleading, and the harmless from the harmful," but has instead outlawed all statements about certification—no matter how valuable the information they contain might be to potential clients—"simply to spare itself the trouble of distinguishing such [statements] from false or deceptive [statements]." *Zauderer*, 471 U.S. at 646. In short, D.R. 2-105 embodies precisely the vice condemned by this Court in *Shapero*, *Zauderer*, and *In re R.M.J.*

The Supreme Court of Illinois did not consider *any* of the numerous, far less sweeping regulatory measures that could protect the general public from potentially misleading claims of certification by attorneys. As demonstrated, a simple disclaimer could provide virtually complete pro-

tection against the risk of consumers incorrectly assuming that the State *itself* had certified the attorney. Yet the court gave no consideration to this regulatory option, notwithstanding this Court's clear injunction in *Bates* and *In re R.M.J.* that additional disclosure is a preferred means of accommodating First Amendment values and state regulatory goals. *Bates*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"); *In re R.M.J.*, 455 U.S. at 203 (ban precluded where "information may also be presented in a way that is not misleading").

The Supreme Court of Illinois failed to consider numerous other effective regulatory measures that many States have *already* adopted for protecting against attorney claims that are based on certification by bogus certifying organizations. For example, despite acknowledging that Minnesota and Alabama have established state mechanisms for review and authorization of certifying organizations "in order to protect the public from spurious agencies and meaningless certifications," 534 N.E.2d at 982; (App. 4a-6a), the court made no effort to explain why that option would not adequately protect Illinois identical interests.[28] The Supreme Courts of Minnesota and Alabama concluded that this alternative is a reasonable and narrowly tailored means that will effectively prevent deception, and for that reason invalidated blanket prohibitions identical to D.R. 2-105. *See Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 341 N.W.2d 282 (Minn. 1983).

Nor did the court below consider the option of state-sponsored certification programs, which many States have adopted as a means to control the risk of unreliable

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[28] Connecticut and Georgia also provide mechanisms for state approval of certifying organizations. These States, as well as Minnesota and Alabama, have all officially approved NBTA certification. *See* Brief *Amicus Curiae* of the National Board of Trial Advocacy in Support of the Petition For Certiorari in No. 88-1775 at 2 n.1.

claims of certification.[29] The court devoted no attention to the option of promulgating substantive criteria certifying organizations would have to meet before attorneys could publicize the fact of certification by those organizations. And the court did not consider the possibility of a regulatory program pursuant to which advertisements containing claims of certification would be submitted for official review simultaneously with publication. Under such an approach, particular misleading statements could be subjected to discipline on a case-by-case basis. *See Shapero*, 108 S. Ct. at 1923 (submission of solicitation letters to state agency is "far less restrictive and more precise means" than blanket prohibition).

Indeed, the application of D.R. 2-105 to misleading attorney claims of certification may well be wholly gratuitous with respect to achieving the State's articulated objectives. Another Illinois attorney disciplinary rule, D.R. 2-101(b), already proscribes any "public communication" that "contain[s] any false or misleading statement or otherwise operate[s] to deceive," including communications that omit "information necessary to make the communication not misleading." Illinois certainly has the authority under D.R. 2-101(b) to act against particular certification claims that mislead the public in the ways posited by the State. In the present case, respondent's complaint against petitioner alleged that his letterhead violated D.R. 2-101(b) as well as 2-105. No violation of D.R. 2-101 was found, because petitioner's claim of NBTA certification was not shown to have been misleading as a matter of fact. But, entirely apart from D.R. 2-105, Rule 2-101 remains available as a narrowly tailored means of acting against particular claims of certification that do in fact mislead the public.

Each of these alternative regulatory schemes represents a means significantly more "narrowly tailored" than D.R.

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[29] *Id.*

2-105 to protect against potential deception of the general public. Many—such as a disclaimer requirement or promulgation of guidelines—would achieve the State's interests at minimal regulatory cost. To the extent some of these narrowly tailored options might impose additional regulatory costs, this Court has "insisted" that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Fox*, 109 S. Ct. at 3034; *accord Shapero*, 108 S. Ct. at 1924; *Zauderer*, 471 U.S. at 646. As shown in the following section, the specific speech at issue here is highly valuable, and worthy of substantial efforts at accommodation.

The State of Illinois has been unwilling to accommodate its regulatory goals and the First Amendment goal of disseminating accurate, nonmisleading information about NBTA certification. The cost of D.R. 2-105 has not been "carefully calculated" to minimize the suppression of valuable expression. To the contrary, D.R. 2-105 represents the *most* restrictive regulatory means available to prevent potential deception. But Illinois is not free to impose a blanket prohibition simply because this approach might be more convenient than the plethora of narrowly tailored options available to it. Because respondent has not met—and cannot meet—its burden of demonstrating that D.R. 2-105 is narrowly tailored to prevent potential deception respecting claims of attorney certification, the First Amendment requires that it be invalidated.

Finally, one of the state interests that purportedly justifies the sweeping ban imposed by D.R. 2-105—the interest in preventing consumers from being misled as to state sponsorship—is insubstantial in most cases. Presumably, concern arises because some members of the public may assume that a claim of certification implies state attestation to the attorney's qualifications. Where an attorney has been certified by a bogus organization,

such a misimpression may harm consumers who rely on the claim in choosing an attorney. But where—as in this case—the certifying organization is bona fide and certification is an accurate indicator of substantial experience and competence, a consumer would suffer no material harm even if he or she erroneously believed that the certification had official backing. A consumer relying on the fact of NBTA certification would receive the services of an able, experienced trial lawyer, whether or not the State was among those endorsing the certification. The State has pointed to no evidence—and there is no reason to assume—that a significant percentage of attorney claims of certification will be unreliable. Consequently, the State has not shown that its interest in preventing consumers from being "misled" in this way is sufficient to justify the blanket prohibition imposed by D.R. 2-105.[30]

C. The Blanket Prohibition Imposed by D.R. 2-105 Substantially Undermines The Interests That Require First Amendment Protection of Commercial Speech.

D.R. 2-105 undermines the core interests that are furthered by this Court's decisions recognizing substantial First Amendment protection for commercial speech. The ban imposed by Illinois deprives prospective clients of information about programs that serve to *enhance* the quality of representation an attorney can offer and that *could* help those prospective clients identify an attorney qualified to handle their particular legal problems. D.R. 2-105 also removes the incentive for noncertified lawyers to gain the experience and knowledge necessary to obtain

[30] *See Bates*, 433 U.S. at 379:

"We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward."

comparable certification. Far from being the "bogus" enterprises suggested by respondent, certification programs in trial advocacy fulfill extremely important and unmet public needs.

The Conference of Chief Justices (of the States) has squarely endorsed specialization programs "as a means to ensure competent counsel and to enable the public to select the best representation of their interests." [33] The Conference of Chief Justices acknowledged that "specialization is a means to ensure competent representation that has been reviewed intensively in recent years by enhancing the performance of the bar *and* the ability of the public to identify appropriate counsel." [32] The years later the Conference of Chief Justices approved a "Model State Court Lawyer Competence Program" that had been developed by the Conference of Chief Justices Committee on Lawyer Competence. That program is reprinted in "Promoting Lawyer Competence," 10 *State Court Journal* (Fall 1986) at 15-23. The model program expressly recommends that state supreme courts "should adopt rules that provide specific guidelines and formal structures under which attorneys may be provided . . . recognition or certification as specialists." *Id.* at 21.

Of course, the fact that a particular lawyer has been certified as a trial specialist will be of no assistance whatsoever to members of the public seeking experienced trial counsel unless that fact can be communicated to them. But as the United States noted in its *amicus* brief in *Bates*, "[u]nfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author,

[31] Conference of Chief Justices' Resolution VII, titled "Court Recognition of State Specialization Plans," adopted by the Conference of Chief Justices Coordinating Council on Lawyer Competence at the Conference of Chief Justices Annual Meeting on August 2, 1984.

[32] *Id.* (emphasis added).

reveals the gross ignorance of the public with respect to lawyers and legal services. . . . One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence." *Amicus Brief* at 24. That unfortunate fact was noted in the Court's opinion in *Bates*: "[s]tudies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services *or because of an inability to locate a competent attorney.*" 433 U.S. at 370 (emphasis added). This Court's decisions in *Bates* and later cases were designed to begin, and have begun, the process of allowing the agency of private communication to remedy these problems. But there can be little doubt that the problems persist, due in no small part to remnants of restrictive policies of the past, such as D.R. 2-105.

Illinois' prohibition of all attorney statements about certification rests on paternalistic notions that this Court's commercial speech cases reject. Like the arguments put forth to justify blanket prohibitions in other attorney commercial speech cases, Illinois' categorical ban "rests on an underestimation of the public." This Court "view[s] as dubious any justification that is based on the benefits of public ignorance." *Bates*, 433 U.S. at 375.

The consequences of state-enforced public ignorance are particularly acute in the present context. The choice of legal representation does not merely involve the satisfaction of purely private preferences—as might the choice between competing consumer products. Rather, the choice implicates important *public* interests in access to the courts, the sound administration of justice, and the vindication of constitutional, statutory and common law rights. *Cf. In re Primus*, 436 U.S. 412 (1978). The public's ignorance about the experience and qualifications of those they choose to represent them before our courts undermines these crucial interests.

Accordingly, even if petitioner's letterhead statement about NBTA certification is considered "commercial speech," the First Amendment requires reversal of the judgment and order below.

II. D.R. 2-105 CANNOT CONSTITUTIONALLY BE APPLIED TO PETITIONER'S LETTERHEAD STATEMENT ABOUT NBTA CERTIFICATION BECAUSE THAT STATEMENT IS NOT "COMMERCIAL SPEECH" AS DEFINED IN THIS COURT'S DECISIONS.

The Supreme Court of Illinois assumed without analysis that the statements on petitioner's letterhead were "commercial speech," and therefore could be regulated under the less exacting First Amendment standards applicable to that category of expression. This conclusion is in direct conflict with the standards previously set forth by this Court.[33]

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[33] The issue whether petitioner's letterhead may be regulated as commercial speech is properly before this Court. Petitioner specifically argued at every stage of the state proceedings that the application of D.R. 2-105 to his letterhead violated the First Amendment. *See* note 14, *supra*. The Illinois Supreme Court squarely considered whether the First Amendment barred application of D.R. 2-105 to petitioner, and rejected the claim. In support of his First Amendment argument, petitioner stressed the undisputed fact that his letterhead was sent only to "other lawyers and *present* clients." 534 N.E.2d at 982 (emphasis added); (App. 4a). The Supreme Court of Illinois expressly noted and rejected that argument. Thus, although petitioner did not specifically argue that his letterhead statement was not commercial speech, the holding of the court below *necessarily* resolved the issue against petitioner when it concluded—in the context of the undisputed facts—that petitioner's letterhead was properly regulated as commercial speech. Accordingly, the court below has by necessary implication decided the issue whether petitioner's letterhead can be classified as commercial speech. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). *See also Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972) (if "constitutional premise" is raised in state court, this Court can use different "method of analysis readily available to the state court"). *Cf. Dewey v. Des Moines*, 173 U.S. 193 (1899).

This Court has repeatedly defined "commercial speech" by reference to " 'the "commonsense" distinction between speech proposing a commercial transaction . . . and other varieties of speech.' " *Central Hudson Gas & Elec. v. Public Service Comm'n of New York*, 447 U.S. 557, 562 (1980) (citations omitted); *see also Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986); *Virginia State Board of Pharmacy v. Virginai Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). This Court's explication of commercial speech standards in *Board of Trustees of The State University of New York v. Fox* makes clear the continuing applicability of this definition. 109 S. Ct. at 3032.

The expression at issue in this case—petitioner's accurate letterhead statement that he is certified as civil trial specialist by NBTA—does not itself propose a commercial transaction, and was not made in the context of proposing a commercial transaction. The communication that triggered the disciplinary proceedings against petitioner was a letter by him to clients he was representing in proceedings before the ARDC, which came to the attention of the ARDC administrator. The only communications by petitioner submitted in evidence at his disciplinary hearing were that letter and a subsequent letter by him to the ARDC. The second letter responded to the ARDC's notification that petitioner was, because of that first letter, the subject of a disciplinary investigation. In neither of those letters did petitioner propose that his services be retained. To the contrary, petitioner was simply exercising the right—itself protected by the First Amendment—to advise clients concerning charges brought by a government tribunal and to respond to charges against him made by that tribunal.

At petitioner's disciplinary hearing, the Administrator of the ARDC did not claim or attempt to prove that petitioner had used his letterhead, or the statement that he had been certified as a civil trial specialist by the NBTA,

as part of a general advertising campaign, or in any effort to solicit legal business from the general public or from any individual. The Administrator was content to establish that, in addition to his two communications with the ARDC, petitioner had used his letterhead to "correspond with other attorneys," and "in the ordinary course of [petitioner's] business of practicing law." H.Tr. at 21; (App. 25a).

Thus, there was no claim or evidence that petitioner's letterhead had ever been mailed to any layman who was not already a client, or that petitioner had ever used that letterhead, or the statement concerning certification by the NBTA, in the yellow pages, or in any advertisements, brochures, or other types of printed materials, and petitioner testified that he had not. The Supreme Court of Illinois, though noting these facts, apparently considered them immaterial. 534 N.E.2d at 982; (App. 4a).

In disciplining petitioner notwithstanding these facts, the court below extended the boundary of regulable commercial speech far beyond any recognized by this Court. *Every* commercial speech case concerning attorneys decided by this Court has involved advertising or solicitation that proposed a commercial transaction. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (solicitation letters to potential clients); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (advertisement); *In re R.M.J.*, 455 U.S. 191 (1982) (advertisements); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (personal solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (price advertising).

That is not to say that statements about certification, or attorney letterheads generally, could *never* be regulable as commercial speech. Context is crucial. If petitioner's claim of NBTA certification had appeared in the Yellow Pages or in a newspaper advertisement, it certainly would be regulable as commercial speech. Simi-

larly, if petitioner's letterhead were used in the course of direct-mail solicitation of the type at issue in *Shapero*, a State would obviously possess the authority to regulate all statements in the letterhead as commercial speech. Where the letterhead statement has not been used in the course of a direct effort to obtain clients, however, the rationale for treating the expression as commercial speech is not present.

The mere fact that petitioner's letterhead statement might inure indirectly to his financial benefit cannot justify classifying the statement as commercial speech. *See Riley v. National Fed'n of the Blind of North Carolina*, 108 S. Ct. 2667, 2677 (1988). Adoption of so amorphous a standard marking the bounds of "commercial speech" would give rise to intractable problems of interpretation. An attorney's participation in bar association and civic activities will often be motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise. Even the display in an attorney's office of diplomas, certificates of bar admission, or photographs memorializing a judicial clerkship, might fall within the ambit of such a definition.

This Court has delineated a straightforward, "commonsense" definition of commercial speech: expression that occurs in the context of proposing a commercial transaction. Application of that definition to the present case requires the conclusion that petitioner's letterhead statement could not be subjected to regulation as commercial speech. The definitional reworking required to bring petitioner's letterhead within the ambit of "commercial speech" would cut the doctrine loose from its original "commonsense" moorings and give rise to insuperable problems of interpretation and application in future cases. Accordingly, this Court should hold that petitioner's letterhead statement about NBTA certification

is not regulable as commercial speech.[34] Respondent has not even argued that this type of noncommercial speech can be banned, so the judgment below should be reversed for this reason as well.

III. D.R. 2-105 VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO PETITIONER BECAUSE THE BLANKET PROHIBITION OF ATTORNEY STATEMENTS ABOUT CERTIFICATION IS IRRATIONAL AND ARBITRARY IN LIGHT OF THE FACT THAT ATTORNEYS CAN COMMUNICATE VIRTUALLY IDENTICAL INFORMATION SO LONG AS THEY USE SLIGHTLY DIFFERENT LANGUAGE.

D.R. 2-105 also violates the Equal Protection Clause of the Fourteenth Amendment. The classification the rule draws between impermissible statements about specialization or certification and permissible statements about fields of concentration and particular specialties is utterly irrational and furthers no legitimate State interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In Illinois, attorneys are explicitly *permitted* to make statements that they are patent, trademark or admiralty lawyers. They are also explicitly permitted to say they "concentrate" their practice in specialty areas (including, presumably, civil trial advoacy). And they may make such statements without fulfilling any state or private criteria demonstrating special competence. Both the specific statements about specialty areas and general statements that attorneys concentrate in specific fields are factual statements from which prospective clients can and will

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[34] The statement about NBTA certification at issue here has value wholly apart from any commercial benefit it might bring to a certified attorney. For example, expression publicizing NBTA certification might serve to enhance an attorney's standing in the legal or political community, or bring to the attention of other practitioners the possibility that they might obtain certification from NBTA or similar organizations.

draw inferences about the likely quality of an attorney's services, or the attorney's experience. A client with a tax problem, for example, will be more likely to pick an attorney who holds herself out as "concentrating" in tax because the client will reasonably assume that the attorney is better able to handle a tax problem than a lawyer with no experience in the field. In this respect, statements about admiralty, trademark or patent law, and statements of concentration in other fields, are indistinguishable in all relevant respects from the statement that petitioner is certified by the NBTA as a civil trial specialist.

Indeed, the statement at issue in the present case is *more* reliable than those permitted by D.R. 2-105 because NBTA's rigorous requirements for certification provide significant assurance that a certified attorney is in fact exceptionally qualified, whereas vague statements about "concentration" contain no such implicit assurance. For example, under D.R. 2-105 an attorney could permissibly advertise one day after admission to the bar that he or she "concentrates" in civil trial advocacy, but could *never* advertise the fact of NBTA certification—even though NBTA certification requires "concentration" of at least 30% of the attorney's professional time during each of the five years preceding application for certification.[35]

Accordingly, the distinction drawn in D.R. 2-105 between impermissible claims of certification or specialization and permissible statements about admiralty, patent and trademark law, and about concentration in a particular field, is utterly irrational, and violative of the Equal Protection clause of the Fourteenth Amendment.

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[35] Furthermore, D.R. 2-101(b) already aims specifically at misleading attorney advertising. To the extent attorney claims of specialization or certification are potentially misleading, Illinois has ample authority under this rule to punish violators. "The existence of these provisions necessarily casts considerable doubt upon the proposition that . . . [the rule] could rationally have been intended to prevent those very same abuses." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973).

CONCLUSION

For the foregoing reasons, the judgment and order of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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